DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 98-007SFT
SPECIAL FUEL TAX FOR THE PERIOD
JANUARY 1, 1994--MAY 31, 1997

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ISSUES

I. Special Fuel Tax--Imposition—Taxable Event

Special Fuel Tax--Imposition—Imports—Parties Liable

Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax

Authority: I.R.C. (26 U.S.C.) §§ 4081-4083 (1994); IC §§ 6-6-2.5-57(b) and -8.1-5-4(a) (1993); IC §§ 6-6-2.5-20, -35 and -40(f) (1993 and Supps. 1994-97); IC § 6-8.1-5-1(b) (1998); Treas. Reg. (26 C.F.R.) §§ 48.4081-1(b) and -2(c)(1) (1996-2002); Treas. Reg. (26 C.F.R.) § 48.4081-1(m) and Temp. Treas. Reg. (26 C.F.R.) § 48.4081-11T(b)(1) (1994-95)

The taxpayer alleges that it is not liable for special fuel tax on fuel sold from five out-of-state terminals in which it maintained inventory positions to several of its customers that have operations in Indiana. The taxpayer argues that information provided by those customers, and its own records, show that the majority of the special fuel was delivered in the respective states of origin, i.e. the states in which the respective terminals from which the taxpayer removed it are located.

II. Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax

Special Fuel Tax--Imposition—Imports—Payment of Fuel Tax to State of Export

Authority: IC § 6-6-2.5-30(a)(1) (1993 and Supps. 1994-97)

In the alternative to its argument that most of the assessed fuel remained in its respective states of origin, the taxpayer contends that tax was paid on the fuel to those states.

III. Special Fuel Tax—Imposition—Status of Taxed Substance as Special Fuel

Authority: IC § 6-6-2.5-22 (1993 and Supps. 1994-97); IC § 6-8.1-5-1(b) (1998)

The taxpayer contends that some of the imports of one of its customers were not special fuel, but kerosene, and as such not subject to imposition of special fuel tax.

SUMMARY OF FINDINGS

The taxpayer's protest is sustained in part and denied in part as to Issue I, and denied as to Issues II and III, as discussed below.

STATEMENT OF FACTS

A. Introduction—The Taxpayer/Supplier, Its Customers and the Terminals

1. The Taxpayer/Supplier

Between January 1, 1994 and May 31, 1997 (hereinafter "the audit period") the taxpayer, an out-of-state general partnership formed by two corporations, refined and distributed petroleum products. It engaged in distribution both through its own chain of retail outlets and to customers that had their own chain-outlet retail operations. The taxpayer did business in Indiana during the audit period, maintaining inventory positions in several terminals in the state. For that reason it held an Indiana special fuel supplier's license from January 1, 1994 to April 30, 1997, when the Department cancelled the license at the taxpayer's request incident to the dissolution of the partnership. (The partnership used the supplier's license of one of its corporate partners to wind up the partnership's affairs.) By virtue of its status as a licensed supplier the Department will also refer to the taxpayer in this letter as "the supplier."

2. The Taxpayer's Customers and Terminals

In addition to its supplier's license, on June 30, 1994 the taxpayer executed and submitted to the Department a Tax Precollection Agreement Application (Form SF-10A). It checked Option 1 on that form, which states that an electing supplier or permissive supplier "agree[s] to treat all out-of-state terminal removals of undyed special fuel for export into Indiana, as if they were received in Indiana, and will collect the Indiana special fuel tax from every purchaser." *Id.*

The audit adjustment in issue in this protest assessed the taxpayer's receipt of unreported gallons of special fuel that formed the subjects of certain transactions between it and eight of its customers. However, the supplier submitted documents to the auditor, or documents or argument in support of its protest, as to only seven of these customers, to which the Department will hereinafter refer as Customers A through G. Each special fuel transaction occurred at one of five terminals, located in one of three states adjoining Indiana, in which the taxpayer maintained fuel inventory positions during the audit period.

B. The Supplier's and Customers' Course of Dealing

There is nothing in the record indicating that these customers were agents of the taxpayer, or that the transactions in question were anything other than arms-length sales of special fuel to these customers. All sales were F.O.B. point of origin. All seven customers picked up their purchases with trucks that they owned or hired.

The supplier issued one or more numbered terminal cards to each driver picking up a load of fuel for one of the taxpayer's customers. The driver was to use the card/s to withdraw fuel from the terminal in question. Each card number was linked to a business location of the purchasing customer and also to the destination state for that location. Drivers picking up fuel for customers with multiple locations (e.g., chain-outlet retailers, including several of the customers whose transactions are in issue in this protest) were issued multiple terminal cards. A driver making a pickup would use the card for the customer and (if the customer in question had multiple locations) the location in question, to access the terminal. In addition to the terminal scanner reading the location/destination number on the inserted card, the driver would also manually enter the destination, as well as the product type. The terminal would then dispense fuel into the cargo tank of the driver's truck and create an invoice, and a bill of lading or fuel receipt (hereinafter also referred to as "the shipping paper") for the transaction.

The shipping paper was supposed to indicate the state of destination with a two-letter abbreviation corresponding to those used by the United States Postal Service. However, some shipping papers nevertheless did not clearly indicate a destination state. In the case of Customer A the bill of lading or fuel receipt indicated a destination state of "XX," i.e. did not indicate a destination state. Shipping papers issued to Customers B and C indicated two destination states, one being the state in which the terminal from which they got the fuel was located and the other being shown as "IN" for Indiana. The shipping paper for the single assessed transaction the taxpayer had with Customer E, and all of the shipping papers the auditor examined for transactions between the supplier and Customer F, indicated a destination state of "XX" with "IN" penciled in.

C. The Taxpayer's Sales Records

When the supplier processed the invoice, its computer system would assign a terminal number, a state code for the customer's location and a number for the fuel's destination. From this data the taxpayer would prepare reports indicating, by customer, the locations of the points of origin and destination for each shipment. The supplier used these reports to prepare its special fuel tax returns. However, the former corporate partner that assumed responsibility for the taxpayer's outstanding audits at the time of dissolution did not retain hard copies of these reports, keeping only a data file copy or copies. The contact person for the audit in issue in this protest, the excise tax manager of that former partner, could not access the data file/s, and there was no programmer available to do so. In addition, by the time of the audit, all of the supplier's former tax compliance personnel had taken positions with other businesses.

D. The Audit and Proposed Assessment on the Additional Imports

The auditor compared the special fuel sales schedules supporting the returns the taxpayer filed for the states where the terminals were located with its Indiana Schedules 2x (Gallons Received

from Distributor on Exchange) and Schedules 3 (Gallons Imported Via Truck, Barge or Rail, Tax Unpaid) for the audit period. The adjoining states' schedules indicated sales to customers with multiple customer numbers, but the numbers of themselves did not indicate the respective destination states of the various shipments. As noted above, there was neither a remaining hard copy of a master list indicating the respective destination states of each customer's special fuel shipments, nor any compliance personnel of the supplier available with whom to discuss the matter. The auditor therefore was unable to reconcile the adjoining states' special fuel sales schedules with the Indiana Schedules 2x and 3 and inferred that additional untaxed special fuel might have been imported into Indiana.

Accordingly, the auditor asked for and reviewed bills of lading for Customers A, B, D, E, F and G. After having done so, at what was to have been the final audit conference with the taxpayer's contact person, the auditor advised that the Department would be assessing the supplier tax on transactions with these customers. The reasons she gave were the deficient identification of the destination state on the reviewed bills of lading issued to Customers A, B, D and F, and that gallons imported by Customer G had been underreported on Indiana Schedule 3. The auditor instructed the taxpayer's contact person to locate any source documents that would show an exact destination for sales made to Customers A, B and D, the three customers whose fuel purchases formed the bulk of the import adjustment. The auditor at that time also scheduled an additional week of fieldwork to review additional source documents. During that week the supplier's contact person submitted to the auditor printouts of invoices the taxpayer had issued to Customers A, B, D, E and G, all of which purported to show that the respective fuel shipments in question had been shipped to states other than Indiana. At the second final conference the auditor rejected the invoices issued to Customers A, B and D as proof because they suffered from the same deficiencies as the respective bills of lading issued to these customers, and the invoice issued to Customer G showed an Indiana destination. The taxpayer's contact person did not, and as of the date this letter was issued the supplier still had not, submitted source documents to the Department showing clear destination states for the fuel shipments in question.

Based on the auditor's findings, the Department proposed an adjustment that would assess the supplier for special fuel tax on all shipments having bills of lading that indicated a destination state of "XX." In addition, the adjustment included special fuel tax on all shipments of such fuel for which the bill of lading showed an Indiana destination, either alone, by the taxpayer having changed a machine-printed "XX" destination on a bill of lading to Indiana by interlineation, or in combination with a destination in another state. Lastly, the assessment included fuel the taxpayer had sold to Customer G but had failed to report on its Indiana Schedule 3. The proposed assessment also included a separate adjustment assessing special fuel tax on certain other underreported gallons of special fuel not in issue here. One of the supplier's former corporate partners timely protested the additional taxable gallons adjustment on its behalf, and the Department held a telephone conference on the protest.

E. Documents Submitted During the Protest

In support of its original protest letter, the taxpayer submitted photocopies of pages from printouts of sales to in-state customers that purportedly supported one fuel tax return the supplier filed during the audit period with each of the three adjoining states. Each such printout page

itemized the supplier's sales by customer name. They each included one of the customers for whose fuel purchases the Department had proposed to assess special fuel tax, and identified each such customer as having a fuel tax license issued by the adjoining state in question. The taxpayer highlighted one or two transactions on each such printout page and included copies of the respective bills of lading for those transactions. One of those bills of lading was for a sale to Customer C and gave a dual destination of Indiana and the adjoining state in which the terminal from which Customer C got the fuel was located. The other bills of lading all gave the destination state as being "XX."

After the Department conducted the telephonic conference on this protest, the supplier submitted a post-conference letter summarizing its position. Along with that letter the taxpayer submitted copies of statements purporting to be from Customers A, B, D, F and G. The statements did not appear to be copies of any source business records, or any other authenticated writings, of these respective customers. The Department therefore presumes that these documents were prepared for purposes of this protest. Although an officer of each customer purportedly signed the statement in question, none of the statements was under oath. Each statement purported to summarize transactions the customer in question had had with the supplier for sample months of the audit period. All of the purported statements used sample months that were after the taxpayer had submitted its Form SF-10A and made its election to precollect special fuel tax, except for the purported statement of Customer F, which covered both the first quarter of 1994 (pre-election) and August 1994 (post-election).

With one exception, the statements purporting to come from Customers A, B, D and F represented that the respective fuel shipments appearing on those statements had been delivered to destinations outside Indiana. That exception again appears on the purported statement of Customer F, which represents that one shipment in March 1994 had an Indiana destination and was reported on its special fuel tax return for that month. The statement purporting to be from Customer G shows that the deliveries listed were made to Indiana, but that a substantial fraction of those shipments allegedly consisted of nontaxable kerosene. The Department will provide additional facts below in the Discussions of the respective issues if and as needed.

I. Special Fuel Tax--Imposition—Taxable Event

Special Fuel Tax--Imposition—Imports—Parties Liable

Tax Administration—Special Fuel Supplier's Duties to Collect/Remit Tax

DISCUSSION

As noted in the Statement of Facts, on June 30, 1994 the supplier executed and submitted to the Department a Tax Precollection Agreement Application (Form SF-10A). It checked Option 1 on that form and thereby "agree[d] to treat all out-of-state terminal removals of undyed special fuel for export into Indiana, as if they were received in Indiana, and [to] collect the Indiana special fuel tax from every purchaser." *Id.* Option 1 tracks, and by electing Option 1 the taxpayer chose to subject itself to, a portion of IC §6-6-2.5-35(j) (1993 and Supps. 1994-97). The General Assembly added subsection (j) to IC § 6-6-2.5-35 in P.L. 18-1994, § 27, 1994 Ind. Acts 423,

440, 443, which took effect July 1, 1994, *id.* at 440. (The General Assembly made no substantive change to IC §6-6-2.5-35(j) during the audit period, although it did make one technical correction to a phrase in this subsection that refers to other sections of IC chapter 6-6-2.5. P.L. 61-1996, § 2, 1996 Ind. Acts 1539, 1542.)

As it read when it took effect, and for the majority of the audit period, IC § 6-6-2.5-35(j) stated in relevant part that:

> [A]ny licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an Indiana destination as shown on the terminal-issued shipping paper *as if the removals were received by the supplier in Indiana pursuant to sections 28 and 35(a) of this chapter, for all purposes.*

Id (emphasis added). The definition of "received" in IC § 6-6-2.5-20 (1993 and Supps. 1994-97) states that "[t]he tax imposed under section 28 of this chapter with respect to special fuel removed from terminals within Indiana …, shall be imposed at the same time and in the same manner as the tax imposed by Sections 4081 to 4083 of the Internal Revenue Code [26 U.S.C. §§ 4081-4083 (1994)]." *Id.* The primary taxable event under the current Special Fuel Tax Law, P.L. 277-1993(ss), § 44, 1993 Ind. Acts 4555, 4734-4757, codified as amended at IC chapter 6-6-2.5 (1993 and Supps. 1994-97), therefore occurs when special fuel is "received" as IC § 6-6-2.5-20 defines that word. Removal of special fuel from an Indiana terminal for consumption, use, sale or warehousing, is one of the acts falling within the definition of "received." *Id. Cf.* I.R.C. § 4081(a)(1)(A)(ii) (imposing the federal fuel manufacturer's excise tax on removal of a taxable fuel from any terminal).

Thus, when the present supplier elected Option 1 on Form SF-10A, it chose from that date forward to treat special fuel removed from an out-of-state terminal that had issued a shipping paper showing an Indiana destination *as if it had originally removed that fuel from an Indiana terminal*. The taxpayer thereby also consented to be ultimately liable, as the licensed supplier, for the tax on all special fuel with a shipping paper that showed an Indiana destination and was removed from any out-of-state terminal in which it maintained an inventory position. As quoted above, IC § 6-6-2.5-35(j) treated all of the taxpayer's removals of such fuel (hereinafter "subject special fuel") as being made "pursuant to sections 28 and 35(a) of this chapter, for all purposes." *Id.* IC § 6-6-2.5-28(a) imposes the tax and states that "[t]he tax shall be paid at those times, in the manner, and by those persons specified in this section and section 35 of this chapter." *Id.* IC § 6-6-2.5-28(c) states that "the tax imposed on special fuel by [IC § 6-6-2.5-28](a) …shall generally be determined in the same manner as the tax imposed by Section 4081 of the Internal Revenue Code and Code of Federal Regulations." *Id.* In turn, Temp. Treas. Reg. (26 C.F.R.) § 48.4081-11T(b) (1994-95) stated concerning diesel fuel, and Treas. Reg. (26 C.F.R.) § 48.4081-2(c)(1) (1996-2002) states concerning all taxable fuel, that in general "[t]he position holder with respect to the [, respectively, diesel or taxable] fuel is liable for the [, respectively, diesel or federal fuel manufacturers' excise] tax imposed …." Treas. Reg. § 48.4081-1(m) (1994-95) (current version at Treas. Reg. § 48.4081-1(b) (1996-2002)) defines "position holder" as "the person that holds the inventory position in the taxable fuel, as reflected on the records of the terminal operator." *Id. Accord, see* IC § 6-6-2.5-23 (1993 and Supps. 1994-97) (defining

"supplier" in part as being "a person …that owns special fuel in the pipeline and terminal distribution system in Indiana," *id.*). Thus, by electing Option 1 on Form SF-10A, the taxpayer agreed that the Department could treat it as an in-state owner and supplier as to each post-election removal of subject special fuel. It also thereby agreed to be liable for the tax on any such removals.

However, by making its election, the supplier in addition consented to other duties by which it could have shifted, and thereby mitigated, its personal liability for that tax. Specifically, the taxpayer consented to the duties to precollect special fuel tax from its purchasers, and to remit the precollected tax to the Department, that IC §§ 6-6-2.5-28 and -35(a) specify upon a receipt of such fuel. IC § 6-6-2.5-35(a) states that "[t]he tax on special fuel received by a licensed supplier in Indiana that is imposed by section 28 of this chapter shall be collected and remitted to the state *by the supplier who receives taxable gallons*…." *Id* (emphasis added). The first sentence of IC § 6-6-2.5-35(c) elaborates on a supplier's duty to collect, stating that "[a] supplier who sells special fuel shall collect *from the purchaser* the special fuel tax imposed under section 28 of this chapter." *Id* (emphasis added). Finally, IC § 6-6-2.5-28(c) states that "the tax imposed on special fuel by [IC § 6-6-2.5-28](a) shall be measured by invoiced gallons of nonexempt special fuel received by a licensed supplier in Indiana for sale or resale in Indiana …." *Id.* Thus the taxpayer, a licensed supplier, consented by making its election under IC § 6-6-2.5-35(j) that from that date on it would precollect special fuel tax, and remit to the Department the tax precollected, from each purchaser of subject special fuel, measured by the gallons invoiced to that purchaser.

The taxpayer argues that the majority of the additional taxable gallons remained in their respective states of origin, thereby implying that liability for Indiana special fuel tax never attached as to those gallons. The supplier has submitted the unauthenticated statements purporting to be from Customers A, B, D and F in support of its argument. However, that circumstance, even if true, and the purported evidence, even if it were authentic, are irrelevant to the previously discussed subjects of the taxpayer's liability for, and its duties to precollect from its customers and remit to the Department, the special fuel tax. The only questions, and the only evidence, bearing on those subjects on this record, are whether the supplier made a valid, binding election of Option 1 on Form SF-10A pursuant to IC § 6-6-2.5-35(j), and whether the taxpayer left any such election in effect. It has not disputed or offered evidence on either of these points. Since the answer to both questions is therefore "yes," then on these facts the supplier's liability for the tax on each removal of subject special fuel, and its duties to precollect and remit that tax on every such removal, became absolute as a matter of law once the election took effect.

The location of the ultimate destination of each shipment is thus simply irrelevant to the existence of that liability and those duties, which as a matter of simple chronology if nothing else plainly attached as to each shipment at the time of its origin, not of its arrival at its destination. Moreover, the taxpayer had no control over the ultimate destination of the fuel in any case, since there is no evidence in the record that any of the customers were acting as the supplier's agents or that the transactions in question were anything other than straightforward sales of fuel to those customers. Any entitlements to abatements of special fuel tax due to diversions of shipments from Indiana or failures to print proper destination information on the terminal-issued shipping papers would have arisen only if the customers had paid the taxpayer the special fuel tax on their respective shipments. *See* IC § 6-6-2.5-40(f) (providing a right to claim a refund of special fuel

tax in cases where the fuel was diverted or the terminal operator printed improper information on the shipping paper). More importantly, since it was the customers who would have paid the taxes, while the supplier would have merely remitted the taxes it precollected, any rights to claim refunds under such circumstances therefore would have been those of the respective customers, not the taxpayer. *See id* (so implying).

The supplier's argument thus is one that it lacks standing to make, and also relies on later actions of other parties to determine whether the taxpayer's ultimate liability for, and its duties to precollect and remit, tax on the subject special fuel existed in the first place. The Department will not interpret a listed tax statute in such a way as to render it a nullity. Relying on 20/20 hindsight to decide whether the liability, precollection and remittance provisions of IC §§ 6-6-2.5-28 and -35 apply would have exactly that effect on those statutes. Given the consequences of adopting the supplier's position, the Department views it as an attempt by the taxpayer to avoid that liability and those duties that were the consequences of its own election and that it thereby freely chose to assume. The Department must therefore reject the supplier's argument.

Even if the Department were to accept the taxpayer's argument on its own terms, however, the documents it has submitted, and its failure to submit other documents, would cause that argument to fail. As previously noted, the statements purporting to be from Customers A, B, D and F are not regularly maintained business records of those customers, were prepared for the specific purpose of use in this protest and are not under oath or otherwise authenticated. Those circumstances alone render them suspect. In addition, however, the supplier has failed to point to any of its own source records that would persuade the Department that the contents of the purported statements of Customers A, B, D and F were true. Nor is it likely that it can do so, since as of the date of this letter it has still failed to produce source records showing exact destinations for the subject special fuel, as the auditor originally had requested during the fieldwork as to Customers A, B and D. The printouts of invoices issued to Customers A, B, D, E and G that the taxpayer did produce during the third week of fieldwork were insufficient evidence of destination, and therefore did not comply with the auditor's request. They were not "terminal-issued shipping paper[s]" as the Special Fuel Tax Law uses that term, i.e. they were not bills of lading, fuel receipts or equivalent documents. The shipping papers of Customers A, B, D, E and F that the auditor was able to review were deficient; they indicated either that Indiana was the destination or a possible destination, or failed to indicate another state as the sole destination, of the fuel they respectively covered. The bills of lading the supplier submitted in support of its original protest letter suffered from the same deficiencies.

IC § 6-8.1-5-4(a) (1993) states:

> (a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, ….

Id. In addition, IC § 6-6-2.5-57(b) (1993) states that "[f]or purposes of reporting and determining tax liability under this chapter, every licensee shall maintain inventory records as required by the department." *Id.* The taxpayer failed in both of these duties, and as a result did

not have the records available with which it could have supported its argument. Thus, even if that argument were relevant, the supplier has failed to sustain its burden of proving it. *See* IC § 6-8.1-5-1(b) (1998) (stating that "[t]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.").

However, the taxpayer's liability for the tax on the subject special fuel does not cover the entire audit period. As noted at the beginning of this Discussion, IC § 6-6-2.5-35(j) did not take effect until July 1, 1994, i.e. the beginning of the third quarter of 1994. Since the statute was not in effect for the first two quarters of 1994, the supplier could not have made an election to assume any liability for, or duties to precollect and remit, tax on any special fuel removed from the out-of-state terminals during those quarters. Accordingly, the Department sustains the taxpayer's protest as to this issue to that extent, but only to that extent.

FINDINGS

The taxpayer's protest is sustained in part and denied in part as to this issue. The taxpayer's protest is sustained as to all special fuel tax assessed on fuel removed from the out-of-state terminals and sold to the taxpayer's customers during the first two quarters of 1994, and is denied as to the rest of the audit period.

II. Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax

Special Fuel Tax--Imposition—Imports—Payment of Fuel Tax to State of Export

DISCUSSION

In the alternative to its argument that most of the assessed fuel remained in its respective states of origin, the supplier contends that tax was paid on the fuel to those states. However, the taxpayer has not been consistent in contending who paid those taxes. In its original protest letter it implied that its various customers had paid the taxes, offering the copies of printout pages it filed in support of its fuel tax returns with the adjoining states. During the telephonic conference with the hearing officer on this protest, however, the supplier stated that it had paid the taxes to the exporting states. Finally, the unauthenticated statement purporting to be from Customer F states that it paid the tax on one shipment of special fuel on its March 1994 special fuel tax return.

Who, if anyone, paid taxes on the subject special fuel to the states of export, is irrelevant to whether the taxpayer is liable for Indiana tax on the subject special fuel. The Special Fuel Tax Law contains no provisions for granting an exemption from, or credit against, that tax for fuel tax paid to another state on the same fuel. The only provision in that law that even comes close is IC § 6-6-2.5-30(a)(1) (1993 and Supps. 1994-97), which exempts special fuel on which special fuel tax has been paid to another state if that fuel is destined for export to that state, not import into Indiana. Even if the Special Fuel Tax Law did provide for abatement of tax for fuel tax paid to another state, the taxpayer presumably would not have standing to claim such relief if its customers, entities unrelated to the supplier, were the ones who had actually paid such taxes. (The Department notes in this connection that the purported transaction involving Customer F

occurred in March 1994, i.e. before IC § 6-6-2.5-35(j) took effect. The taxpayer therefore could not then have been primarily liable for, and could not then have had duties to precollect and remit, tax incurred in connection with any transactions with Customer F in any case.) Nor, presumably, would the supplier have standing to file claims for refund for those taxes in the states of export. The copies of the printouts the supplier submitted in support of its fuel tax returns to the adjoining states are therefore not relevant evidence that the taxpayer is not liable for Indiana special fuel tax.

Accordingly, if the supplier (not its customers) paid fuel taxes on the subject special fuel to the states of export, it would have to claim refunds from those states, not seek an abatement of assessed, unpaid special fuel tax in this state.

FINDING

The taxpayer's protest is denied as to this issue.

III. Special Fuel Tax—Imposition—Status of Taxed Substance as Special Fuel

DISCUSSION

The supplier had reported all of the gallons of fuel sold to Customer G on the taxpayer's schedules of fuel sold to licensed customers filed with the exporting state. However, it reported a lower number of gallons for some of those transactions on its Indiana Schedules 3, and the auditor assessed tax on the difference between the two figures as unreported gallons. The taxpayer now contends that some of the imports of Customer G were not special fuel, but kerosene, and as such not subject to special fuel tax. In support of its argument, it offers the purported statement of that customer.

The definition of "special fuel" in IC § 6-6-2.5-22 (1993 and Supps. 1994-97) does exclude kerosene. *Id.* However, the purported statement from Customer G suffers from the same evidentiary deficiencies described generally under Subsection E of the Statement of Facts and as to Customers A, B, D and F in particular in the Discussion of Issue I above. The Department incorporates those remarks by reference as if fully set out here. In addition, there are no copies of source records in the auditor's workpapers, nor has the supplier submitted any source records, that would corroborate its assertion. Accordingly, the taxpayer has failed to sustain its burden of proof that the unreported gallons it sold to Customer G were nontaxable kerosene. *See* IC § 6-8.1-5-1(b) (1998) (stating that "[t]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.").

FINDING

The taxpayer's protest is denied as to this issue.

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